UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRAVADO INTERNATIONAL GROUP MERCHANDISING SERVICES, INC., **Plaintiff,** **vs.** **JOHN DOES 1-100, individuals, JANE DOES 1-100, individuals, and XYZ COMPANY, business entity form unknown, inclusive,** **Defendants.**	)	**CIVIL ACTION NO. 1:16-cv-11466**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S EX PARTE APPLICATION FOR: A TEMPORARY RESTRAINING; A SEIZURE ORDER; AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION AND SEIZURE ORDER SHOULD NOT ISSUE

I . INTRODUCTION.

Plaintiff Bravado International Group Merchandising Services, Inc. ("Plaintiff") submits this Memorandum in support of its Ex Parte Application for: a Temporary Restraining Order; a Seizure Order; and an Order to Show Cause Why A Preliminary Injunction and Seizure Order Should Not Issue (the "Order"). Plaintiff seeks this Order to stop the sale at concerts of unauthorized merchandise, and seize the same here as well as nationwide, which bears the trademarks[1], service marks, likenesses, logos, and/or other indicia of the musical group "GUNS N' ROSES" similar to ones granted by this and other District Courts to this and other groups, including for prior tours by the group. See Certificate of Counsel filed concurrently herewith, and Exhibits thereto. For the reasons stated below, such relief is warranted under the Lanham Act § 1051 et seq., F.R.C.P. Rule 65, and the All Writs Act.

II. STATEMENT OF FACTS.

On July 19 and 20, 2016, at Gillette Stadium in Foxboro, Massachusetts, "GUNS N' ROSES" (the "Group ") will perform. See the Declaration of Scott Faraday ("Faraday Decl.") and the Certificate of Counsel pursuant to F.R.C.P. Rule 65 ("Burns Cert.") filed herewith. Defendants currently identified as Does, also referred to as "Bootleggers," are engaged in the manufacture, distribution and sale of unauthorized T-Shirts and other merchandise that bear the federally registered trademarks, service marks likenesses, logos and other indicia of the Group ("Infringing Merchandise") and will continue to do so at the concert in this District and at other sites on the tour as they have done at the Group's prior concerts. Faraday Decl. ¶¶ 3-19.

[1/] The Group has obtained for their "Guns N' Roses" trademark US Federal Registrations No. 2035815 for IC 025 clothing, and other registrations. Faraday Decl. ¶ 5.

To combat this, Plaintiff has obtained for other artists from this and other District Courts temporary restraining and seizure orders, and thereafter preliminary injunctions and nationwide seizure orders to seize the infringing merchandise of such defendants, similar to the one Plaintiff seeks for this Group. See Certificate of Counsel and its Exhibits, including Atlantic Recording Corporation v. Does, et al., Case No. 15-cv-13333 RWZ (D. MA 2015) (Judge Zobel) (for Twenty One Pilot's tour); Bravado International Group Merchandising etc. v. Does, Case No. 14-cv-11681 RWZ (D. MA 2014) (Judge Zobel) (for Cher's tour); and Bravado International Group Merchandising etc. v. Does, Case No. 14-cv-12560 RWZ (D. MA 2014) (Judge Zobel) (for Billy Joel's tour).

Plaintiff easily meets the required showing and there is no defense to the claims brought by Plaintiff. Plaintiff is the exclusive licensee of the Group, and the sole merchandiser for the Group's authorized merchandise which will be sold during the Group's tour. Faraday Decl. ¶ 4. Plaintiff has therefore demonstrated a substantial likelihood that it will succeed on the merits. The Infringing Merchandise harms Plaintiff and the public in numerous ways. Each sale of Infringing Merchandise by Defendants is an irrecoverably lost sale for Plaintiff. Absent the relief requested herein, Plaintiff's monetary losses could aggregate in the hundreds of thousands of dollars. Moreover, the loss and damage to the goodwill of both Plaintiff and the Group, through the distribution of inferior merchandise which will necessarily be seen as associated with them, cannot be calculated or remedied. Faraday Decl. ¶¶ 10-19; Burns Cert. ¶¶ 6-20.

The public interest will be served by issuance of the relief requested. The public interest favors the protection of property/contractual rights. There is no potential harm to any legitimate interest of Defendants if the requested relief is issued. In addition, the relief requested here is the only proven method of protecting Plaintiff's rights and the public from inferior merchandise, merchandise which bears a false designation of origin and created and sold by the Defendants, who are accountable to no one, whether for payment of royalties, sales taxes, or for quality control. Faraday Decl. ¶¶ 12-18.

The need for an ex parte order is manifestly evident. Defendants' actions are completely unauthorized, and Defendants have both the means and motivation to destroy vital evidence before a noticed hearing and avoid service. Similar orders have been obtained to protect the rights of merchandisers and distributors thereon against bootleggers and their unauthorized goods. In response to these orders, although thousands of bootleggers have been served, defendant bootlegger do not challenge these order since apparently they know their activities are unlicensed and unlawful. See Burns Cert. Accordingly, Plaintiff requests that this Court issue the requested order.

III. **DEFENDANTS SHOULD BE ENJOINED FROM SELLING, DISTRIBUTING, AND MANUFACTURING INFRINGING MERCHANDISE.**

The standard for granting a preliminary injunction is well-settled in this Circuit. In order to obtain a preliminary injunction, it must be demonstrated that:

> (1) plaintiff exhibits a likelihood of success on the merits; (2) plaintiff will suffer irreparable injury if the injunction is not granted; (3) such injury outweighs any harm which granting the injunction would inflict on defendant; and (4) the public interest will not be adversely affected by the granting of the injunction.

CCBM.com, Inc. v. c-call, Inc. 73 F. Supp. 2d 106, 109 (D. Mass., 1999*);* Keds Corp. v. Renee Int'l Trading Corp., 888 F.2d 215, 220 (1st Cir. 1989). Plaintiff meets this standard. Moreover, once a violation of the Lanham Act is demonstrated, injunctive relief should issue. Brockum Co. v. Blaylock, 729 F.Supp. 438, 445 (E.D. Pa. 1990).

A. There Is A Substantial Likelihood That Plaintiff Will Prevail On The Merits Because Defendants Have Violated 15 U.S.C. Section 1125(a).

Courts have repeatedly held that the use of registered and unregistered names, images and logos of musical groups by bootleggers causes irreparable injury and violates section 43(a) of the Lanham Act. Brockum Co. v. Blaylock, 729 F.Supp. 438, 444 (E.D. Pa. 1990) (there is no necessity under §43(a) that the marks in question be registered); SKS Merch, LLC v. Barry, 233 F. Supp. 2d 841, 853-854 (E.D. Ky 2002) (sales by Doe Defendant Bootleggers of merchandise bearing the unregistered marks of the artist Toby Keith violates section 1125 (a) and a nationwide seizure order was issued); Winterland Concessions Co. v. Sileo, 528 F.Supp. 1201 (N.D. Ill. 1981), mod. on other grounds, 735 F.2d 257 (7th Cir. 1984); Nice Man Merchandising, Inc. v. Logocroft, Ltd., 23 U.S.P.Q. 2d 1290 (E.D. Pa. 1992) (use of the names, trademarks, logos and likenesses of musical performers on defendants' merchandise without permission from plaintiff merchandiser "is likely to cause confusion, to cause mistake and to deceive. Such confusion and/or deception will continue to result in immediate and irreparable injury to plaintiff.")

The purpose of the Lanham Act is "to protect persons engaged in . . . commerce against unfair competition" and "to prevent fraud and deception in such commerce." 15 U.S.C. §1127. This broad prohibition against "unfair competition" covers not only confusion as to source or sponsorship between Defendants' Infringing Merchandise and Plaintiff's merchandise, it also prohibits the misappropriation of the efforts of others. See R.H. Donnelly y Corp. v. Illinois Bell Telephone, 595 F.Supp.1202, 1206 (N.D. Ill. 1984) ("those who invest time, money and energy into the development of a product and its accompanying good will should be allowed to reap the advantages of their investment");

Boston Athletic v. Sullivan, 867 F.2d 22, 33 (1st Cir. 1989) ("a party cannot reap where it has not sown").

To establish a violation of section 43(a) "a plaintiff must demonstrate (1) that it is the prior owner of the trademark, and (2) that the defendant adopted a trademark that is the same or confusingly similar, so that consumers likely will be confused about the proper origin of the goods or services, such that a consumer is likely to believe that defendant's goods or services are being sold with the consent or authorization of the plaintiff, or that defendant is affiliated with or connected to the plaintiff." Ocean Bio-Chem, Inc., 741 F. Supp. at 1554 (citation omitted); Nassau v. Unimotorcyclists Soc. of America, Inc., 59 F. Supp. 2d 1233, 1236, (M.D. Fla. 1999); New West Corp. v. NYM Co. of California, Inc., 595 F.2d 1194, 1201 (9th Cir. 1979) (for purposes of injunctive relief, it is not necessary to show actual confusion or deception, but merely the likelihood of such). These elements are clearly present here. The merchandise are goods, the Defendants travel from state to state and effect the sale of Plaintiff's merchandise during the tour and the use of Plaintiff's marks creates a false designation likely to confuse.

The First Circuit has identified various factors to consider when determining whether a likelihood of confusion exists: (1) the type of mark, (2) the similarity of the marks, (3) the similarity of the parties' products or services, (4) the similarity of the parties' retail outlets and customers, (5) the similarity of the advertising media used, (6) the defendant's intent, and (7) the actual confusion engendered by the parties' uses. Judged by these factors, Defendants' have violated the Lanham Act and there is no excuse of Defendants' use of Plaintiff's marks. The trademarks, likenesses, and other indicia of the Group licensed to Plaintiff are strong marks, known to literally millions of members of the public. Defendants are using the same exact marks as Plaintiff and selling their unlawful products at the Group's performances. Using the traditional scale of marks from the generic to the arbitrary, the Group's marks are arbitrary in that they do not describe the goods to which they are attached but instead provide identification, thus they have acquired secondary meaning and are incontestable. Defendant Bootleggers will be copying the trademarks, likenesses, logos and other indicia of the Group, therefore there can be no doubt as to consumer confusion. Faraday Decl. ¶¶ 8-19. Since Defendants are aware of the Group's use of their trademarks, there is a presumption of bad faith. See AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 354 (9th Cir. 1979) (deception may be presumed from the knowing adoption of a similar mark).

It is clear that the sale of unauthorized, bootleg T-shirts and other merchandise bearing the trademarks, likenesses and other indicia of well-known performers constitutes a violation of §43(a) of the Lanham Act. SKS Merch, supra, Nice Man Merchandising, 23 U.S.P.Q. at 1292 ("the use of well-known performers' names and likenesses upon novelty merchandise without the performers' authorization constitutes a violation of § 43(a)"); Winterland Concessions Co. v. Creative Screen Design Ltd., 214 U.S.P.Q. 188 (N.D. Ill., 1981). As set forth by the District Court in Brockum Co. v. Blaylock:

> Defendant [Bootlegger] cannot obtain a "freeride" at the [exclusive licensee's] expense. Its shirts are designed to take advantage of the efforts and expenditures of the plaintiff and benefit from the goodwill associated with the Rolling Stones, their 1989 tour, and the promotion of the event created or undertaken by the plaintiff and the Rolling Stones. Such unlicensed use of the Rolling Stones' name would permit the defendant to reap where it had not sown. Boston Athletic Ass'n v. Sullivan, 867 F.2d 22, 33 (1st Cir. 1989). Defendant's argument that the T-shirt in question merely celebrates an "event" is circular reasoning, at best, given the fact that there would be no "event" to celebrate, were it not for the hard work and financial outlay provided by the plaintiff. 729 F. Supp. at 444.

Defendants have manufactured Infringing Merchandise for the sole purpose of selling it at the Group's concerts. It is beyond dispute that Defendants have and will continue to knowingly utilize Plaintiff's marks to deceive the public and create the appearance that Defendants' Infringing Merchandise is sponsored by or originated from Plaintiff or the Group, and Plaintiff has no control over the quality of the merchandise. Defendants' sale of Infringing Merchandise is intended to "free ride" on the trademarks, likenesses and other indicia of those the Group, that have acquired value through the extensive efforts of the Group. This is precisely the conduct Section 43(a) was designed to stop.

B. There Is A Substantial Likelihood That Plaintiff Will Prevail On The Merits Because Defendants Have Violated 15 U.S.C. Section 1114.

Under 15 U.S.C. § 1114, Plaintiff must show that Defendants have used the registered trademark: (1) without consent; (2) in connection with the sales of goods; and (3) where such use was likely to cause confusion or to deceive purchasers as to the source or origin of the goods. Golden Door, Inc., v. Odisho, 437 F.Supp. 956, 962-63 (N.D. Cal. 1977), aff'd 646 F.2d 347 (9th Cir. 1980), ovr'd other grounds. 287 F. 3d 866 (9th Cir. 2002).

Plaintiff is likely to prevail on its §1114 claim for the same reasons that it is likely to prevail on its claim under § 1125(a). New West Corp. v. NYM CO. of California, 595 F. 2d at 1201. ("The likelihood of confusion test also is used for claims of trademark infringement under 15 U.S.C. 1114.). Since the Defendants use the federally registered marks on Infringing Merchandise and sell such goods at the very places where the Tour will be performing, there is no doubt as to the confusion and intent of the Defendants.

C. Plaintiff Will Suffer Irreparable Injury.

Although it is now unclear if irreparable injury is still presumed in a case of trademark infringement and Lanham Act violations following the Supreme Court's decision in eBay, Inc. v. MercExchange, LLC, 547 U.S. 388 (2006) (see also Swarovski v. Building 19, Inc., 704 F.2d 44, 53 (1st Cir. 2013) discussing without deciding whether the presumption survives after eBay), irreparable injury is shown by the fact that Plaintiff has no control over the Infringing Merchandise or its quality. Further, these peddlers appear at and near the venue, rarely have identification or keep records of their sales. Accordingly, Plaintiff will suffer a loss of goodwill due to sales of inferior Infringing Merchandise. SKS Merch, LLC, 233 F. Supp. 2d at 847 (although irreparable injury is presumed once infringement is shown, "Plaintiffs have independently established that they will be irreparably harmed absent a Preliminary Injunction enjoining the sale of bootleg merchandise related to Toby Keith throughout the nation."); Hard Rock Cafe Licensing v. Pacific Graphics, 776 F. Supp. 1454, 1463 (W.D. WA 1991) ("in trademark infringement or unfair competition actions, once the plaintiff establishes a likelihood of confusion, it is ordinarily presumed that the plaintiff will suffer irreparable harm.").

D. The Threatened Injury to Plaintiff Outweighs Potential Harm to Defendants.

Plaintiff has demonstrated that the threatened injury to Plaintiff outweighs the potential harm to the Defendants. Hard Rock Cafe, 776 F. Supp. at 1463 (valuable "Hard Rock Café" logo symbolizes the goodwill connected with [plaintiff's] business and that good will should not be jeopardized by placing it in the hands of [defendants].") Any inconvenience to Defendants will be merely economic, consisting primarily of lost profits from distribution of the illegal, Infringing Merchandise (and a bond will be posted by Plaintiff). Plaintiff will be seizing only Infringing Merchandise from those Bootleggers at the concert venues. Those in active concert with, or assisting the bootlegging are also violating the Lanham Act and must be enjoined, as provided for by Rule 65.

E. **The Public Interest Will Be Served By Issuance Of The Injunction** .

An essential purposes of the Lanham Act is to protect the consuming public from being misled as to the source of goods:

> While plaintiff is injured when consumers purchase [defendant's merchandise] believing it to be [plaintiff's merchandise], consumers, too are being directly victimized. An injunction is thus in the public interest; only if the distribution of [defendant's goods] is stopped can further fraud be avoided.

Corning Glass Works v. Jeannette Glass Co., 308 F. Supp. 1321, 1328 (S.D.N.Y.), aff'd, 432 F.2d 784 (2d Cir 1970). Public interest is especially strong when a federal statute expressly forbids the conduct in question. Here, Defendants act in flagrant disregard of the laws. In sum, Plaintiff is entitled to injunctive relief.

VI. PLAINTIFF IS ENTITLED TO EX PARTE RELIEF CONSISTING OF A TEMPORARY RESTRAINING ORDER AND A SEIZURE ORDER.

A. An Ex Parte Order Is Necessary To Combat Defendants' Activities.

Courts have issued temporary restraining order and orders of seizure in advance of concerts to stop the sale of Infringing Merchandise. See Burns Cert. and Exhibits thereto. This procedure is specifically authorized by statute; 15 U.S.C. §1116 provides for injunctions "upon such terms as the court may deem reasonable" to prevent violations of Lanham Act. See, In re Vuitton et Fils, S.A., 606 F.2d 1, 4 (2d Cir. 1979) and cases cited therein (court has inherent power to issue seizure orders); Universal City Studios, v. Kamma Industries, 217 U.S.D.Q. 1162 (S.D. Tex. 1982). See also Burns Cert.

Moreover, the Lanham Act *specifically contemplates that a temporary restraining and seizure order against Infringing Merchandise may be had by ex parte application.* Section 1116 (d) authorizes *ex parte* orders where, in addition to the traditional requirements for injunctive relief: (1) an order other than an ex parte seizure order is not adequate, (2) the applicant has not publicized the requested seizure, and (3) the person against whom seizure would be ordered would destroy or otherwise make inaccessible to the court the infringing matters. 15 U.S.C. §1116(d)(4)(B).[2]

In the instant case, however, although the defendants are not yet specifically identified by name, it is clear from their activities that they will be present in this jurisdiction only long enough to sell their unauthorized goods. After the unauthorized goods are sold, they promptly disappear. Even if Defendants received notice and were served with a proposed restraining order, it is highly unlikely they would voluntarily comply and not sell their goods. See Faraday Decl. and Burns Cert. Simply stated, there is no other means of preventing the Defendants from destroying Plaintiff's legitimate business without a seizure order.

A Court of Equity must be flexible and must be willing to issue an injunction appropriate under the particular circumstances of the case. See the All Writs Act, 28 U.S.C. § 1651 which broadly authorizes Federal Courts to issue "all writs necessary or appropriate in the aid of their respective jurisdiction and agreeable to the usages and the principles of law." Since there is no other remedy available to Plaintiff to prevent irreparable injury, this Court has the power to order the seizure of illegal merchandise as an exercise of its inherent power to obtain and retain jurisdiction in the matter. In Joel v. Does, 499 F. Supp. 791 (E.D. Wisc. 1980), the Court stated:

[2/]Further, in enacting the Trademark Counterfeiting Act of 1984, Congress in no way intended to change existing case law under Rule 65 and traditional equitable powers of a District Court under the Lanham Act, which have long been interpreted by courts throughout the country to authorize the issuance of ex parte seizure orders involving unregistered trademarks. The legislative history of the Act makes clear that it was not intended to supersede or negate the line of cases beginning with In Re Vuitton, 606 F.2d 1, 4 (2d Cir. 1979), and the protection they provide.

> Were the injunction to be denied, Brockum would be without any legal means to prevent what is clearly a blatant infringement of their valid property rights. While the proposed remedy is novel, that in itself should not weigh against its adoption by this Court. A Court of Equity is free to fashion whatever remedies will adequately protect the rights of the parties before it. Id., at 792.

B. Rule 65 of The Federal Rules Of Civil Procedure And the Lanham Act Provide Authority For The Ex Parte Relief Plaintiff Seeks.

Rule 65 of the Federal Rules of Civil Procedure permits the issuance of an ex parte temporary restraining order when failure to issue such an order would result in "immediate and irreparable injury, loss, or damage," and the movant demonstrates why notice should not be required. The irreparable harm from Defendants selling and distribution activities has been shown. It will continue to mount until Defendants are enjoined. Since Defendants have the temerity to conduct blatantly unlawful activities, making a business of selling infringing articles, and have an economic interest in continuing their unlawful actions, there is no reason to believe they will voluntarily stop.

The Court in Vuitton, supra, found that immediate and irreparable injury existed because of the substantial likelihood of confusion created by the itinerant Bootleggers selling their unauthorized goods and plaintiff had shown why notice should not be given:

> [A]lthough this Court has frowned upon temporary restraining orders issued even without telephone notice there are occasions when such orders are to be countenanced. In our judgment, this case is just such an occasion. [***] Assuming that all of the other requirements of Rule 65 are met, the Rule by its very terms allows for the issuance of an ex parte temporary restraining order when (1) the failure to issue it would result in "immediate and irreparable injury, loss or damage" and (2) the applicant sufficiently demonstrates the reason that notice "should not be required." In a trademark infringement case such as this, a substantial likelihood of confusion constitutes, in and to itself, irreparable injury sufficient to satisfy the requirements of Rule 65(b)(1). [* * *] If notice is required, that notice all too often appears to serve only to render fruitless further prosecution of the action. This is precisely contrary to the normal and intended role of notice, and it is surely not what the authors of the rule either anticipated or intended. 606 F.2d at 4-5.

C. It Is Appropriate To Issue A TRO And Search Order To Enjoin Activities Of Persons Whose Identities Are Presently Unknown.

Plaintiff is proceeding to stop the bootlegging activities of Boston Defendants, and those who are or will be in active concert and participation, whose identities are presently unknown. Courts have long recognized that known adversaries may be designated as "John Does" until plaintiff is able to specifically identify them. See SKS Merch, supra, Bivens v. Six Unknown Names Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971); John Hancock Mutual Life Ins. Co. v. Central National Bank in Chicago, 555 F. Supp. 1026 (N.D. Ill. 1983). Plaintiff need not await the consummation of the threatened injury to obtain preventive relief. Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298 (1979); Anderson v. Hooper, 498 F. Supp. 898 (D.N.M. 1980). Indeed, any assertion to the contrary would constitute a conceptual rejection of provisional remedies available to a party who has sustained or is in immediate danger of sustaining a direct injury. Flast v. Cohen, 392 U.S. 83 (1968); Babbitt, supra, 442 U.S. at 298.

In circumstances similar to the facts herein, many federal courts have issued temporary restraining and seizure and impoundment orders to enjoin various Doe Defendants from manufacturing, distributing, selling and otherwise commercially exploiting infringing merchandise associated with the tours of performers. In each case, an ex parte order was issued against unidentified defendants, originally designated as Does, to prevent the sale and to seize of merchandise bearing the trademarks, logos and other indicia of performers represented by the plaintiff in those actions. See Burns Cert. and Exhs thereto.

In Billy Joel v. Does, supra, held that although the court does not favor unknown defendants and may not have in personam jurisdiction, in the case of Bootleggers:

> I am convinced that the requested injunction [and seizure order] should issue in the present case. ... The problem of the defendants' identifies is met, I believe, by the fact that copies of the summons, complaint, and restraining order itself will be served on all persons from whom Billy Joel merchandise is seized on the night of the concert. These parties will be asked to reveal their names so that they can be added as parties to the law suit. [* * *] [w]ere the injunction to be denied, plaintiffs would be without any legal means to prevent what is clearly a blatant infringement of their valid property rights. 499 F. Supp. at 792.

If courts failed to recognize "Doe" Defendants, clever wrongdoers could (and will) easily conceal their true identities until a statute of limitations run out, or, as here, they could leave Plaintiff with no practical recourse for violations of their rights. Moon Records, 217 U.S.P.Q. 39 (N.D. Ill. 1981) ("the problem regarding the identity of the defendants will be met by requiring copies of the complaint and the [order] to be served upon all persons from whom infringing merchandise is seized..."). Consistent with F.R.C.P Rule 4(j), Plaintiff's process servers will make every reasonable effort to further identify the Defendants for purposes of amending the pleadings.

It has been the repeated experience of Plaintiff and Plaintiff's counsel that most, if not all, of the Bootleggers are persons extremely experienced with selling Infringing Merchandise. Most are not neophytes, but rather somewhat sophisticated businessmen who operate in stealth to thwart the legitimate rights of Plaintiff. Bootleggers travel around the country from venue to venue selling their counterfeit wares. Many defendants even have the audacity to print the entire tour schedule of performers such as the Group on the back of the bootleg T-shirts which they sell. Any person found selling a shirt bearing the entire Tour schedule can fairly be said to be "aiding and abetting, or acting in active concert with," served Defendants who have sold similar shirts at other concerts.

V. A MULTI DISTRICT INJUNCTION AND SEIZURE ORDER ENJOINING DEFENDANTS' CONDUCT ACROSS THE COUNTRY IS BOTH NECESSARY AND PROPER.

A. Courts Have Issued Nationwide Injunctions and Seizure Orders.

It has been shown by the declaration submitted in this matter that the sale of Infringing Merchandise by the Defendants is in violation of the Lanham Act and causes deception to the public. As such, all remedies under the Lanham Act are appropriate and have regularly been exercised by many courts across the country in factual and legally identical circumstances. The multi-district relief sought has been granted in numerous cases in other jurisdictions across the country. See Burns Cert. It is specifically authorized by statute. Section 1116 provides for enforcement and service "anywhere in the United States where [Defendants] may be found." 15 U.S.C. § 1116(a). See Burns Cert. and Faraday Decl. Further, F.R.C.P. Rule 65 provides that an order granting injunctive relief binds the named parties, those related to the named parties and those in active concert or participation with them who receive actual or other notice of an order even if beyond the territorial limits of the district court enjoining said activity. F.R.C.P. 65(d). See, Nintendo of America v. NTDEC, 822 F. Supp. 1462, 1466, 1468 (D. Ariz. 1993) (the Court issued a worldwide injunction ordering defendants to deliver up infringing goods for destruction); Golden Door, Inc., supra, 437 F.Supp. 968 ("plaintiff's market area, and hence, sphere of reputation, are nationwide. Accordingly, it is entitled to nationwide protection against confusion and dilution. The scope of the injunction must therefore be nationwide"); The Five Platters, Inc. v. Purdie, 419 F. Supp. 372 (D. Md.

1976) ("the Lanham Act provides for nationwide enforcement of injunctions"); Benson v. Paul Winley Record Sales Corp., 452 F. Supp. 516 (S.D.N.Y. 1978).

The propriety of such a multi-district order has been established by numerous district courts throughout the country, as explained herein and as has been explained at length by the Fifth Circuit in Waffenschmidt v. Mackay, 763 F. 2d 711 (1985).

> Non-parties who reside outside the territorial jurisdiction of a district court may be subject to that court's jurisdiction if, with actual notice of the court's order, they actively aid and abet a party in violating that order. This is so despite the absence of other contacts with the forum. [* * *] Courts do not sit for the idle ceremony of making orders and pronouncing judgments, the enforcement of which may be flouted, obstructed, and violated with impunity, with no power in the tribunal to punish the offender. [Federal] courts, equally with those of the state, are possessed of ample power to protect the administration of justice from being thus hampered or interfered with. Id., at 714, 716 (citations omitted).

Decisions that address issues raised by this action include SKS Merch, LLC v. Barry, supra, and Plant v. Does, 19 F. Supp.2d 1316 (S.D. Fla. 1998). In both cases, plaintiffs sought nationwide injunctions and seizure orders to enforce the rights of groups during their nationwide tour. The district court in SKS Merch, after reviewing the Plant and two other adverse decisions,[3] granted a nationwide injunction and authorized that illegal goods be seized nationwide.

The Court in SKS Merch noted that the Court in Plant was concerned that plaintiff failed to attempt to identify any defendants. However, as set forth in the Faraday

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[3/] At that time there were two published cases where similar relief was requested: Brockum Intern'l v. Various John Does, 551 F. Supp. 1054 (E.D. Wisc. 1982) (decided soon after enactment of § 1116 (d) stating these issues are best left to local authorities); Brockum Co. v. Various John Does, 685 F. Supp. 476 (E.D. Pa. 1988) (decided shortly after the 1116 took effect; the Court granted the local TRO and seizure order, but declined to issue a national order because plaintiff had made an adequate showing that the order would be carried out properly, and (2) it was the only realistic way to control the problem). For reasons set forth in SKS Merch and the Burns Certificate, these cases should not be controlling.

Declaration and the Burns Certificate, Defendants will appear as they have on this and the Group's prior tours and on tours by other groups of the caliber of this Group; they refuse to identify themselves (making any type of identification virtually impossible), they do not carry identification, and they demand to see Plaintiff's "order." Faraday Decl. ¶¶ 1, 11, 15; See also Burns Cert. ¶¶ 13, 14, 21. To require Plaintiff to wait for even a few shows for relief to somehow identify those who refuse to identify themselves and run away through crowds would seriously impede its rights. The merchandise will be taken and a bond will be posted. The harm to Plaintiff, however, is irreparable.

Further, the SKS Merch Court recognized what has been the modus operendi of these Bootlegger Defendants – that they fail to carry identification, they are well aware the goods they sell are unauthorized, and they flee when approached by authorized individuals, so attempts to actually identify these Defendants will be futile. Id., at 849. The person who ends up suffering is that of the plaintiff merchandiser, who has no other recourse. Although the plaintiff in SKS Merch waited many performances before seeking relief, Plaintiff here respectfully requests that it should not wait since each performance of the prior and similar tours were heavily bootlegged from the beginning and with each performance. Plaintiff will be harmed. The bootlegging will continue and the only one who will gain, and gain momentum, will be the Defendants.

Moreover, the Appellate Court in World Wrestling Entertainment, Inc. v. Unidentified Parties, 770 F. 3d 1143, (2014), reversed the lower court's finding that Plaintiff WWE had to "identify" unnamed Doe Defendants at WWE shows because WWE demonstrated (like Plaintiff here) that it was the only authorized seller. "The resulting confined universe of authorized sellers of WWE merchandise necessarily 'identifies' any non-WWE seller as a counterfeiter. *WWE cannot know in advance the specific identities of counterfeiters who will present themselves at any given event, but it does know that any non-affiliated seller at or near an event is almost certainly a counterfeiter.* In this case, therefore, the 'person[s] against whom seizure would be ordered' are readily identifiable as any non-affiliated person purporting to sell WWE merchandise at or near a live WWE event." Id., at 1145 (emphasis added).

The Court in Plant was concerned that no "procedural means" existed to issue and enforce the injunction. The Court in SKS Merch held section 1116 permits such injunctions. Moreover, it is contemplated to be had on the basis of an ex parte application, not a noticed motion. Further, concerns about service raised in Plant are addressed here as they were in SKS Merch; Defendants' names may be added after service has taken effect and names (preferably proper) will be provided. Because the goods are the same from location to location, this represents a concerted effort and therefore Defendants are on notice.

B. The Court Will Have Jurisdiction Over The Defendants and Those Acting In Concert With Them.

Once Defendants have been served at the concerts, this Court acquires personal jurisdiction over them. F.R.C.P. Rule 4. See John Hancock Mutual Life Ins. Co. v. Central Nat'l Bank, 555 F. Supp. 1026 (N.D. Ill. 1983) (service of process under Rule 4 confers jurisdiction on this Court even with respect to Doe defendants). At the preliminary injunction hearing, this Court should enjoin all the Bootlegging activities during the entirety of the Group's nationwide tour. An order granting injunctive relief will bind not only the actual named parties to an action, but also "their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them who receive actual notice of the Order by personal service or otherwise." F.R.C.P. Rule 65(d). Vuitton, Et Fils, S.A. v. Carousel Handbags, 362 F.2d 339, 344 (9th Cir. 1979) (court may bind parties to preserve its ability to render judgment in a case over which it has jurisdiction); McGraw Edison Co. v. Performed Line etc., 362 F.2d 339, 344 (9th Cir.) cert. denied, 385 U.S. 919 (1966) (non-parties may be found in contempt of an injunction if they have actual notice of the Order, and aid and abet in its violation).

The Bootlegging operation to be enjoined here is a concerted action of many individuals acting together with the Defendants to be named in the preliminary injunction. The nature and quality of merchandise seized indicates a concerted operation. Indeed, for each tour of a group, Plaintiff's employees frequently observe the same individuals selling Infringing Merchandise at each of the group's tour dates. The quantities of such merchandise indicates a large manufacturing operation or operations that distribute its goods at numerous, if not all, locations on previous tours. Identical shirts have been found at several locations on other tours, indicating that the Bootleggers go from one location on the tour to another to sell their merchandise. Therefore, any relief granted to Plaintiff must continue throughout the tour and operate against these Defendants in order to be effective. Faraday Decl. ¶¶ 11-20.

Each time there is a seizure pursuant to the order, the requirement of notice to the person against whom the relief operates will be satisfied. Once the preliminary injunction is issued it will be served on anyone selling Infringing Merchandise on the tour. They will therefore have notice of the injunction at the concert and when their goods are seized. It is believed that all seizures will be effected upon Bootleggers selling substantially identical shirts throughout the country and will be through a concerted operation. See Faraday Decl. However, in the unlikely event that any individuals spontaneously decide to print their own "homemade" shirts, such individuals would be violating Plaintiff's rights and would be subject to suit in any event. Seizure of such shirts, if any existed, would be virtually identical to seizure under a local order issued in that district. Such a local order would not afford them any greater notice or due process. However, to avoid even a theoretical question, Plaintiff will waive any objections to venue and transfer the action. Indeed, as to the orders granted to Plaintiff, only one defendant bootlegger has objected which was denied by the judge. See Burns Cert.

C. Defendants Have A Full And Fair Opportunity To Be Heard.

Defendants have the opportunity to appear. Plaintiff would welcome such appearances for it would permit it to identify the bootleggers, take discovery from them, and pursue them for money damages. The proposed Order provides that a person who wishes to challenge the seizure has the opportunity to appear; giving any defendant a full and fair opportunity to be heard, while the merchandise, the critical piece of evidence, is preserved. Otherwise, separate civil actions would have to be filed at an expense of over $425,000 in legal fees and costs. Thus, it would be inequitable to place such an enormous and unnecessary burden on Plaintiff whose rights are clear and who evidence a remedy that works. Based on the foregoing, Plaintiff respectfully requests that its application be granted in all respects.

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Respectfully Submitted
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